Supreme Court of the United States

OCTOBER TERM, 1970

No. 322

JOSEPH McKEIVER AND EDWARD TERRY,
Appellants,

v.

PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

October 17, 1968—Defendant Joseph McKeiver adjudged delinquent of robbery and larceny and placed on probation.

November 7, 1968—Petition for re-hearing on behalf of Joseph McKeiver filed by Community Legal Services.

February 13, 1969—Petition for re-hearing for Joseph McKeiver based on the failure of the court to allow a jury trial denied.

March 27, 1969—Defendant Edward Terry adjudged delinquent.

April 17, 1969—Certiorari from Superior Court of Pennsylvania filed as to the appeal of Joseph McKeiver.

May 6, 1969—Certiorari from Superior Court of Pennsylvania filed as to the appeal of Edward Terry.

August 19, 1969—Order affirmed by Superior Court as to appeal of Joseph McKeiver.

August 19, 1969—Order affirmed by Superior Court as to appeal of Edward Terry.

September 3, 1969—Appeal to Supreme Court of Pennsylvania filed by Edward Terry.

September 5, 1969—Appeal to Supreme Court of Pennsylvania filed by Joseph McKeiver.

May 15, 1970—Order affirmed by Supreme Court as to appeal of both Edward Terry and Joseph McKeiver. Opinion and dissenting opinions filed.

FORM 1000 ~~9-68~~ Pre.Crr. 5/15/68"A"

State of Pennsylvania } ss.
PHILADELPHIA COUNTY

In the County Court of
Philadelphia
JUVENILE DIVISION

.....Term, 19....

To the Honorable Adrian Bonnelly, P.J.
One of the Judges of the Juvenile Court.

Your petitioner Anthony Cannalongo of
County Court Street, a reputable person, and resident of said
County, respectfully represents that Joseph McKeiver 2320 N. Natrona St.
N. 12-1-52 Bapt.

(State age, color, sex and religion)

now within the County is an alleged delinquent person in this: it is alleged
That Joseph McKeiver did, on or about 4/11/68 at or about 1.55 P.M.,
at or near 3300 W. Diamond Street, rob the complainant, Reggio
James, of articles of personal property. The boy is charged with
Robbery, Larceny, and Receiving Stolen Goods.
(Insert nature of delinquency, and if arrested the charge)

and that the parents or custodians of said child are
William and Asalee
A
Strawberry Mansion

and the following named persons have knowledge of the said delinquency or of the condition of the said child

Your petitioner therefore prays this Honorable Court to inquire into the truth of matters herein contained, and to make such orders in the premises as may seem meet and proper, and your petitioner will ever pray, etc.

Anthony Cannalongo

OVERSIZE PAGE SEE NEXT FRAME
FOR REMAINDER OF PAGE

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Anthony Cannalongo

STATE OF PENNSYLVANIA, } ss.
PHILADELPHIA COUNTY }

Anthony Cannalongo, being duly sworn, says that the facts set forth in the above petition are true according to the best of his knowledge and belief.

Anthony Cannalongo

Subscribed and sworn to before me this 15th day of April 68

Clerk of the Court

I HEREBY CERTIFY the foregoing to be a true and correct copy of the original as filed of record in this office.

R. Magenise
Clerk of
QUARTER SESSIONS COURT

VI.

4/15/68 C.O. 5/15/68 "A"
Robb., Larc., hSG 12-20-67 R-A 2:00 PM

7-16-68

No. 10124

_____ Term, 19

In the County Court of Philadelphia

JUVENILE DIVISION

IN THE MATTER OF

Joseph McKelver
N. 12-1-52 Bapt.
William & Asalee
2320 N. Natrona St.

131550

AN ALLEGED DELINQUENT CHILD

PETITION

MAY

Continued to 7-16-68 for
hrg. adjudicatory hearing.
Lifted to C.L.S.J.

Continued

C.P.A.
Richard Cih. Atty.

WITNESSES

OCT 17 1968

Adjudged Delinquent Child
Care. PROBATION

Petition

IN THE COUNTY COURT OF PHILADELPHIA
JUVENILE DIVISION

C.C. NO.

FILED 9-4-68

DATE OF OCCURRENCE 19-68-8564 8-31-68

NAME OF ALLEGED DELINQUENT CHILD	ADDRESS (No. & Street) (City & State) (Zip Code)	DATE OF BIRTH
Edward Terry	1741 N. 53rd St. 19131	2-23-54

Your petitioner respectfully represents that the above named juvenile who resides at the above address is a delinquent child in need of care, guidance and control who, on the date set forth, did violate the law of the Commonwealth of Pennsylvania, as follows:

School Unk.

It is alleged that Edward Terry did on or about 8-31-68 at or about 7:05 p.m. in company with others act in a disorderly manner while at or near Parkside and Lindenwood St. strike Officer Swaney [illegible]

The boy is charged with assault and battery on officer and conspiracy.

COMMONWEALTH OF PENNSYLVANIA } ss.
COUNTY OF PHILADELPHIA }

Subscribed and sworn to before me this 4th day of September 19 68

Pro Clerk

I, the petitioner, being duly sworn, say that the facts set forth in the above petition are true according to the best of my information and belief.

Petitioner

	NAME (S)	ADDRESS (ES)
PARENTS OR LEGAL GUARDIANS	Edward (add.?) Caroline Terry	1741 N. 53rd St.
WITNESSES	NAME (S)	ADDRESS (ES) OR POLICE BADGE NO.

YOU HAVE A RIGHT TO HAVE A LAWYER – YOU AND YOUR LAWYER MUST APPEAR AT THE TIME OF HEARING

(Date) (Courtroom)

☒ Case is listed for hearing at 9:00 a.m. on 9-10-68 1 TROT 1ING STREET ☐ You will be notified of hearing date.

74-1 (Rev. 5/66)

JUVENILE'S COPY

VII.

IN THE COUNTY COURT OF PHILADELPHIA

JUVENILE DIVISION

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[9]

IN THE MATTER OF JOSEPH McKEIVER

No. 131550

Robb., Larc., RSC

Philadelphia, Pa., October 17, 1968

1801 Vine Street
Room D

Before: HON. THEODORE S. GUTOWICZ, J.

PRESENT:

EDWIN D. WOLF, ESQ.,
Assistant District Attorney
RICHARD A. ASH, ESQ.,
Community Legal Services for Defendant

(All Parties Sworn.)

MR. ASH: On this particular case, Your Honor, I was just in the middle of interviewing this boy, I had never seen him before, and I am not ready to proceed with it.

THE COURT: When were you appointed for this case?

MR. ASH: We have an interview in our file. When Community Legal Services was appointed—I have not seen this boy before, I don't take the initial interview, and I of course have to interview the boy on my own right.

THE COURT: Take five minutes out now to interview him.

(A short recess.)

MR. ASH: Your Honor, respectfully, I just discussed this with Mr. Wolf. I think the arresting officers ought to be here, because this is one of these situations where something happened in the park and they drove these boys around, without any lineup or any protection for this boy, and they picked him out when they were being driven around and surveying all the boys in the park. I think they ought to be here.

THE COURT: I don't think the law of lineup applies in this situation.

MR. ASH: Your Honor has ruled, but I am just indicating I would like the police to be here. The reason they are not here is because of this thing, but, on the other hand, since it's going to turn on the issue of credibility between my client, who is a juvenile, and these others, I am going to ask for a jury trial.

THE COURT: I ruled once before. Your motion for jury trial is refused. You filed a petition once before, and I refused it.

Mr. Wolf, what is the position of the Commonwealth?

MR. WOLF: We are ready to proceed, Your Honor. The police officer is not here, as you know, but we do not feel that his presence is necessary.

THE COURT: Fine. Then you proceed with the case. I'm ready to hear it.

MR. WOLF: Thank you.

THE COURT: When was CLS office appointed?

MR. ASH: Your Honor, I can only look at the file. I don't know when the court appointed us, I can tell you—

THE COURT: I don't want to look at the file, so you tell me when you were appointed.

MR. ASH: I don't know, Your Honor.

COURT REPRESENTATIVE: They were referred on 5/15/68.

THE COURT: May 15, 1968. In other words, the court notified CLS of its representation on May 15, 1968?

COURT REPRESENTATIVE: Yes.

THE COURT: All right, then, we are ready.

COMMONWEALTH'S EVIDENCE

BY MR. WOLF: (to James Raggio)

Q. What is your name?

A. James Anthony Raggio.

Q. James, how old are you?

A. 15.

Q. Where do you live?

A. 2514 South Darien Street.

Q. James, we would like you to tell us about the incident which occurred to you in the park, back in April.

A. I was walking—

Q. First, what time of day was this?

A. I was walking on—it was about 1:30, 2 o'clock. I was walking in Fairmount Park, you know, on this reservoir. So there was these kids, they were coming toward us. So we ran down, and there were these other three kids, on bikes. And two kept going, and one stopped, and they wanted money. So I said—

Q. Who was with you?

A. These two boys (indicating).

Q. These two boys were with you?

A. Yes.

Q. How many boys came up to you?

A. Well, three boys on bikes, but I don't remember the exact amount of the other ones.

MR. ASH: Your Honor, I am going to ask that the other two boys be sequestered, because this happened a substantial length of time ago and I would like the testimony to be from the memory of the boys rather than be refreshed from hearing each other testify. So I would ask for sequestration of the boys who are not testifying.

THE COURT: Is there any opposition to that?

MR. WOLF: No, sir.

THE COURT: All right, take the boys out.

(Two boys escorted from the courtroom.)

BY MR. WOLF:

Q. So you were with your two friends. Were you walking or on bicycles?

A. We were walking.

Q. Who came up to you?

A. There were some kids that chased us down from the reservoir, and three kids on bikes, two of them kept on

going and one stopped. They asked for money, and I said, "I don't have any. I only have a quarter and I have to get home with it."

He said, "I want the quarter." And I said, "You can't have it, it's the only quarter I have."

And he said, "Give me the quarter or I'm going to hit you." I said, "You can't have the quarter. Go ahead and hit me, but you can't have the quarter."

So then he hit me, and I gave him the quarter. And some old guy was coming in a car, and he picked us up and took us to the police station, and we told the policeman, and he got him.

Q. Where did he hit you?

A. (Indicating). In the face.

Q. Is that boy in the courtroom today?

MR. ASH: Objection.

A. Yes.

Q. Will you point him out?

THE COURT: Objection overruled.

A. (Pointing).

MR. WOLF: Indicating the young man standing at the bar of the court.

MR. ASH: Your Honor, may the record indicate there is only one boy standing at the bar of the court, and only one boy in the courtroom besides the complainant.

THE COURT: Are there co-defendants in this case?

MR. ASH: Not that I know of.

THE COURT: He is the only defendant.

MR. ASH: He is the only boy at the bar of the court.

THE COURT: All right.

BY MR. WOLF:

Q. When this fellow took you to the police station, do you know what police station you went to?

A. Well, we went to—well, we went to this like post, or something, and there was a man on a horse, and he called up other guys, and we went in a car, and got him. And then—I don't recall, you know, the police station, I didn't know—it was in the park, though.

Q. After you got to the police station, what did you do when you got there?

A. Well, they took our names and everything. And, well, we were just waiting around.

Q. Then what happened?

A. They called the JAD, and he came up and he told us—he asked us. Then the policeman drove us home.

Q. After you were struck and the money was taken from you and the boy rode off on the bike, when was the next time you saw him?

A. The next time I saw him—I saw him ride down the road. But then he told us to get in the car and he said we'd find him.

Q. Who was this?

A. It was a police officer. I don't know his name, though.

Q. He told you to get in the car. Was this at this police station?

A. No, we were still at that police post, and he called the police car up, and it came and took us, and he said, "we'll find him," and I said, "Okay."

Q. So then what happened? You were in the police car and you drove around the park?

A. We drove around, we drove out in the street and everything, you know, down Diamond Street. And we were driving in the park, and then I saw him and I told him it was him.

Q. What did the policeman do?

A. The policeman told him to get in the car. There were two, three cars with us, and he told us to get in the car, and he told him (pointing) to get in the car, and he took him to the police station.

MR. WOLF: Cross examine.

CROSS EXAMINATION

BY MR. ASH:

Q. James, how old are you?

A. 15.

Q. And you go to school?

A. Bishop Neumann.

Q. James, this incident happened between about 1:30 and 2 p.m.?

A. Around there. Maybe 2:30, I don't recall.

Q. Then this man helped you get in contact with the police; is that right?

A. Yes.

Q. Then the police drove you around?

A. Yes.

Q. How much time elapsed between the time that the boy struck you and the time that you pointed out a boy?

A. About 15, 20 minutes.

Q. And you indicated you drove, what, around the park and through Diamond Street?

A. Yes—well, I don't know if it was Diamond. It was a street out in, like out of the park. Maybe it was Diamond Street, I don't know.

Q. There were a lot of boys in that park, weren't there?

A. (Nodding head in the affirmative.)

Q. You have to say Yes or No.

A. Yes.

Q. Had you ever seen the boy that struck you, before this day?

A. No.

Q. And this was the first time you had ever seen him, wasn't it?

A. Yes.

Q. How much time did this incident involve, from the time you first saw this boy until the time he struck you and left you?

A. About five or ten minutes; ten, at the most.

Q. And I assume he was a Negro boy, wasn't he?

A. Yes.

Q. Was he wearing glasses or wasn't he wearing glasses?

A. No, he wasn't wearing glasses.

Q. This incident happened in April, 1968, and you haven't seen that boy since the incident happened, have you?

A. No.

Q. What kind of clothing was that boy wearing, do you remember?

A. I think he was wearing a blue, like sweat shirt, and he was riding a black Italian racer, but I don't know—he had sneakers on.

Q. Are you sure at this time what he was wearing?

A. I'm sure he had a blue sweat shirt on, with a hood on (indicating).

Q. I know about this, you are a very fair and honest boy, and I want you to know that—

THE COURT: Let's keep comments out of the question. You are cross examining.

MR ASH: Certainly.

THE COURT: That is objectionable.

BY MR. ASH:

Q. When the police took you around, there came a time when you pointed a boy out; is that right?

A. That's right, yes.

Q. Was there anything special about the boy you pointed out?

A. Well, there was—well, anyway, the boy I pointed out —there was two other kids with him, and he had to give the bike back to some other kid because it wasn't his, and why I remember him—I couldn't forget him.

Q. Was he riding a bicycle?

A. He was riding a bicycle. He rode away. In fact—

Q. You said something about him having to give the bicycle to somebody else.

A. Yes, because it wasn't his bike.

Q. You don't know, do you?

A. He said, "take this bicycle and give it back to" so and so, I don't know who it was.

Q. Now the boy that's at the bar of the court, looking at him at this point, he is wearing glasses, isn't he?

A. Yes.

Q. Now you stated he was the same boy that you pointed out?

A. Yes.

Q. How are you sure of that?

A. Well, —

Q. Or are you sure of it?

A. I'm sure. I couldn't forget him. I got hit by him, I don't think I could forget him.

Q. So you are indicating to the court that a boy you saw in April, 1968, and you haven't seen until today, you are sure this is the same boy?

A. I'm sure.

Q. Is that what you are saying?

A. Yes.

Q. And you saw that boy for five minutes in April, '68, and you had never seen him before?

A. Well, I saw him in the court when we were in the

police station, I saw him, I saw him for about an hour, because he was just sitting there, waiting for the JAD.

Q. But you haven't seen him since April, 1968, have you?

A. No.

Q. Is there anything special about this boy that makes you remember him?

MR. WOLF: Your Honor, I object.

THE COURT: Sustained.

Mr. Wolf, I have been waiting.

BY MR: ASH:

Q. Now there have been times in your life, haven't there, when you have been absolutely certain of something, and found out later you were wrong? Isn't that a fact?

A. Yes.

MR. ASH: I have no further questions.

THE COURT: Talking to the defendant, now will you take your glasses off and turn around and face the complainant here?

BY THE COURT: (to Witness)

Q. Now I want to ask you a question. Now look at this boy again. Are you positive he's the boy who hit you?

A. Yes.

MR. ASH: Your Honor, I have to take exception to the form of that question, it's a leading question.

THE COURT: You may take an exception. Let it be noted.

BY THE COURT:

Q. You are sure this is the boy that you met in the park?

A. Yes.

Q. And you are sure he is the one that you pointed out to the police?

A. Yes.

THE COURT: All right.

MR. WOLF: I have no further questions of this witness.

BY MR. WOLF: (to Anthony Mirarchi)

Q. What is your name?

A. Anthony Mirarchi.

Q. Where do you live?

A. 2522 South Darien.

Q. How old are you?

A. 13.

Q. Do you remember an incident that happened in the park when you were with James and your other friend?

A. Yes, I do. We were walking up the reservoir, on top, and there was these kids running down, about 20 or 30 of them. We went down the hill. And there was three boys on a bike, walking—riding on the bike. And two other kids went, and the kid stopped, and he wanted our money. We gave it to him but Jimmy, over here (indicating), didn't. So he punched him. So—and he ran, on the bike.

So we went in the cop car, we went after them. We just happened to find this kid, you know. So we thought it was him, so we—so that's it.

Q. Did you give him money?

A. Yes, we gave him a quarter.

Q. Did you yourself give him any money?

A. Yes, yes.

Q. Why did you give him the money?

A. Because he wanted it and we couldn't do anything, because there were about 20 other ones.

Q. Is the boy in court today?

MR. ASH: Objection.

A. Excuse me?

THE COURT: Objection overruled.

BY MR. WOLF:

Q. Is the boy in court today?

A. That got punched?

Q. Yes.

A. Yes, he's right over there (pointing).

Q. No, the boy who took the money.

A. Yes, I think he is.

Q. Who is he?

A. This boy, right here (pointing).

MR. WOLF: Cross examine.

CROSS EXAMINATION

BY MR. ASH:

Q. Anthony, where do you go to school?

A. Stella Maris.

Q. There were three of you together in the park?

A. Yes.

Q. How many boys came up to you?

A. Well, there was about 20 of them in back of us, you know, and about three kids on the bike, but two of them went. So they wanted our money. So somebody went in my pocket and took it out, and went in the other boy's and took it out. But this kid over here (pointing) didn't want to give it to him, and one punched him.

Q. Who asked for the money, do you know?

A. This boy right here (pointing).

Q. Well, were some of the other 20 boys involved in this?

A. No, they weren't.

Q. There were three of you together, and this boy approached you; is that what you are stating?

A. Yes.

Q. And his other two friends had ridden off?

A. Yes.

Q. So he was alone, and the three of you were together?

A. Right.

Q. And you have indicated he asked for money?

A. Yes, he did, he wanted our money. So I gave it to him, but Jimmy, over here, didn't give it to him, so he punched him.

Q. Where did he punch him?

A. In the jaw, right here (indicating).

Q. Had you ever seen this boy before?

A. No, I didn't, except the incident that happened out in Fairmount Park.

Q. How long did that incident take place?

A. It was in April, Holy Thursday day.

Q. How much time was involved in the taking of the money from the three of you?

A. I'd say about a minute.

Q. And then the boy went off?

A. Right.

Q. Did he ride off on a bicycle?

A. Right.

Q. Then, after that, how did you come in contact with the police?

A. This guy was riding in a car and he stopped and he broke it up. So he brought us to the little station. And the cop car went after him, and we caught him.

Q. So you drove around with the police; is that right?

A. Yes.
Q. How long did you drive around, before—
A. About eight minutes, nine minutes.
Q. And you saw a lot of boys, didn't you?
A. Yes.
Q. There were a lot of boys riding on bicycles in the park that day, weren't there?
A. Well, when we were riding we didn't see that many.
Q. But you saw him, didn't you?
A. Yes.
Q. What was the boy wearing on that day, do you remember?
A. No, I don't.
Q. Was he wearing glasses?
A. I don't remember.
Q. Now isn't it a fact you don't remember that this boy (pointing) is the same boy you saw, in April?
A. The only reason I can tell is by his actions and his looks.
Q. His actions. What kind of actions?
A. Well, the way he walks.
Q. You haven't seen him walk here, have you?
A. Yes, in this courtroom.
Q. What was there special about his walk?
A. The way he, you know—I can't explain it.
Q. What is special about his looks?
A. The way he talks, you know, and his eyes.
Q. Now you saw that boy, you have indicated, for approximately a minute, in April, 1968, and you had never seen him before, had you?
A. No.
Q. You have never seen him since, until today, have you?
A. No, I haven't.
Q. Are you able to say this is the same boy you saw in April, after all that span of time?
A. No.
MR. ASH: The answer was no.
I have no further questions.

REDIRECT EXAMINATION

BY MR. WOLF:
Q. After the boy was picked up were you with him in the police car?

A. No, he was in the wagon.

Q. Did you see him at the police station?

A. Yes, I did.

Q. Did you have any doubt then that this was the boy—

MR. ASH: Objection.

Q. (Continuing)—who had taken the money?

A. See, it's hard, you know, to remember the boy; that was from April until now.

Q. That wasn't the question I asked you. I asked you whether at the time when you were in the police station with him, did you have any doubt then that this was the boy?

MR. ASH: Objection.

THE COURT: Objection overruled.

A. No, I didn't.

MR. WOLF: No further questions.

MR. ASH: Thank you.

MR. WOLF: The Commonwealth rests, Your Honor.

DEFENDANT'S EVIDENCE

BY MR. ASH: (to Defendant)

Q. Joseph, you have been sworn here to tell the truth, and you are to tell nothing but the truth to His Honor, the judge.

A. Yes.

Q. I want you to speak directly to him and in a manner so he can hear your every word.

Now, do you remember a time in April when you were arrested by the Park Guard in the park?

A. Yes.

Q. Can you describe the incidents leading up to that arrest?

In other words, where were you and who were you with?

A. Yes, sir. It was me, it was me and a boy named Mark Blunt, and another named Michael Williams. Me and Michael and Mark, we was driving up 33rd Street, and we seen the Park Guards around the playground, in the playground. So me and Mark and Mike, we rode around and we seen the Park Guards, and we seen some boy sitting in the car, and there were a lot of people around. So we went over there and we asked what happened, and they said the boys got robbed.

So me and Mikey and Mark, we rode off. So then the Park

Guard and these boys came over there to us. It was a wagon and a car and there was some Park Guards on horses. And then they stopped us, and then they told the boys to point us out, and the boys overlooked the other two but they pointed at me.

So the Park Guard searched me and he put me in the wagon, and then he took me down. Then he asked me questions and stuff. But they said I took a quarter off them, and then he found 40 cents.

Q. They found 40 cents on you?

A. Yes.

Q. Now you have indicated you were riding on 33rd Street?

A. Yes.

Q. Where were you coming from on 33rd Street?

A. I was coming from around my way.

Q. Around your house?

A. Yes. We were going to the park.

Q. Where do you live, by the way?

A. 2320 North Natrona Street.

Q. Was that the first time you entered the park that day or had you been there before?

A. That was the first time, you know, in the park.

Q. You have indicated when you entered the park you saw a group of people and you went over and you asked them what had happened, and then you learned there was a robbery: is that right?

A. Yes.

Q. Then you went on your own business, and then the police drove up, with these boys?

A. Yes.

Q. How much time elapsed between the time you made your inquiry and the time that the police came after you?

A. It was around, about six or five minutes.

MR. ASH: Cross examine.

CROSS EXAMINATION

BY MR. WOLF:

Q. How long have you worn glasses?

A. I wore glasses since I was small.

Q. Do you wear them all the time?

A. No.

MR. WOLF: I have no further questions.

THE COURT: Is that it?

MR. ASH: Your Honor, we are going to rest. I take the opportunity to make summation.

Your Honor sits as both trier of facts and determiner of law. Your Honor has heard the facts, and you now sit as the jury. I ask Your Honor to charge yourself, sitting as the jury, that the burden is on the Commonwealth to prove that this boy is guilty beyond a reasonable doubt, he comes here with the presumption of innocence. The boy has testified that he was with two companions, he entered the park, when he saw a crowd of people he went to those people and made inquiries. They said there was some sort of robbery. I submit if he was the guilty person involved in the robbery the last place he would have gone would have been where the people were collecting.

Then he stated he rode on, and five or six minutes later the police vehicle came by, with the boys, and he was with two other boys, and they said, "that's the boy."

Now the boys have indicated there were three boys involved in some way. It would seem to me that they indicated that all three boys were involved. If they thought the two boys with him were the guilty parties—I'm not questioning the good faith of the complainant here, and I think it is a terrible thing that happened to him—but the only issue here is whether this is the boy who committed that improper act. Because, I submit, Your Honor, as you sit as a jury, we have to be aware of human experience. An unknown person —I can only speak from my personal experience—if I meet a person for five minutes, that I had never seen before, I certainly couldn't stand in this court, from April until today, which I think is six months later, and say, "yes, I'm certain this is the same boy." We can't forget, as people, we can't forget, as judges and people, what we must remember as people. There were many boys in the park. I submit there is nothing special about this boy. I submit the boy that pointed him out did select a boy who he thought was similiar or was the same boy that had accosted him. I submit the boy that accosted him did not stay in that park.

I ask that this boy be given the presumption of innocence and that he be found to be not proven guilty of this offense.

THE COURT: Mr. Wolf?

MR. WOLF: I think it's essential that we do remember in the courtroom that we must bring with us our knowledge and our experience of the way human beings operate. I recall an occasion on which I was faced with a group of people, several years ago, who were threatening me. I remember them very vividly, they are engraved in my mind, I could pick them out in a crowd today.

This boy, James Raggio, who was the first witness, didn't just happen to spend five minutes with someone, he was threatened by him and he was hit by him. I think that our knowledge of human experience should indicate to us that this is the kind of situation where one is very likely to remember exactly what a person looks like.

In addition, after the initial identification, he had an opportunity to spend time with him.

THE COURT: Yes, one hour in the police station.

MR. WOLF: One hour. Which is why he remembers so clearly today that he's the boy who did it.

As far as the second witness is concerned, he is honest enough to admit he has no definite recollection.

THE COURT: He wasn't the kid who was hit.

MR. WOLF: That is right; which is an important distinction.

Also, he said at the time it happened he did remember and he was able to say this was the boy. And I think this is a very important circumstance in considering whom you believe, because that's the issue.

This boy does come with a presumption of innocence, but I think the situation here is that you have two witnesses who identify him as the one involved in this incident, and I would suggest that the case has been proven beyond a reasonable doubt.

MR. ASH: Your Honor, I want to make just one very brief comment in response to Mr. Wolf.

Your Honor, there is case after case of mis-identification, where somebody was absolutely certain, even bringing the thing to its most—well, I withdraw that. But we have even the famous case where in a totally dark room there was a pistol shot, and the person said that by the light of that pistol, "I'll never forget that face."

THE COURT: Don't bring in a dark room. This was at 1:30 or 2 o'clock in the afternoon.

MR. ASH: I was only bringing in that incident where the person said, "I absolutely know"—

THE COURT: The Court adjudicates him delinquent of larceny and robbery.

The case has been proven beyond a reasonable doubt. There are two firm identifications. Especially by the one who was hit in the face, he didn't flinch, he spoke straightforward, he remembered him, he pointed him out. He pointed him out to the police, and the identification was made within a 15 minute period from the time the incident happened untl the time he was picked up.

Where is the mother?

(Mother of defendant to the bar of the court.)

THE COURT: How many children do you have?

MRS. MC KEIVER: Nine. I have four boys. And could I say one thing, Your Honor?

THE COURT: Surely.

MRS. MC KEIVER: I don't really believe my son hit that boy, because this one is not a violent child.

THE COURT: You weren't there.

MRS. MC KEIVER: No.

THE COURT: It could happen. I'm glad it wasn't as serious—

MRS. MC KEIVER: And the robbery, I don't believe that, because that boy—

THE COURT: Well, that's the legal terminology, where it's taken by force or with fear, that's what we call robbery.

MRS. MC KEIVER: I know. But he has more money than I has. I borrowed money off him.

THE COURT: He has more money than you do?

MRS. MC KEIVER: Because he works. He's been working in the drug store, in the afternoon, I don't know for how long.

THE COURT: All the children live with you?

MRS. MC KEIVER: No. Me and my husband separated, and some live with my husband. I live two blocks away, but I be there twice a day. Six stay with him.

THE COURT: How old are your children?

MRS. MC KEIVER: I have one 28, 26, 19, 17, 15, 14, 13, 12 and 10.

THE COURT: What school do you attend?

THE DEFENDANT: I go to Daniel Boone.

MR. ASH: We are trying to get him transferred.

MRS. MC KEIVER: He's getting transferred.

MR. ASH: He is getting transferred.

MRS. MC KEIVER: He's supposed to go to Edison. They have two boys in the same grade, they have him mixed up in the graduation, and they sent him, for punishment.

THE COURT: Are any of your other children in trouble?

MRS. MC KEIVER: No.

THE COURT: Is there a family record?

Well, we have Kenneth McKeiver.

MRS. MC KEIVER: That's his brother.

THE COURT: William McKeiver.

MRS. MC KEIVER: He's the oldest one.

THE COURT: Who is Louise Ann White, your daughter?

MRS. MC KEIVER: My oldest daughter.

THE COURT: Well, we have three records here.

MRS. MC KEIVER: She don't live here, she's in New York.

THE COURT: Ma'am, all I can say is I have some information on your background, and it's not very pleasant, because it's not the kind of home that is conducive to raising good, healthy children. You have children by your husband, you have them by a paramour. You can't do things like that, in these kinds of times. And this might be a reflection, because this is the fourth child that is in court. So your batting average is not too good. It's close to 57 percent. You have had four in court out of nine.

Is he your youngest?

MRS. MC KEIVER: No, it's a girl, she is 10.

THE COURT: All right, we'll place him on probation.

All I can say is to watch him, and make sure he goes to school. There must have been a problem in school.

MRS. MC KEIVER: He goes to school. The teacher was being nasty with him.

THE COURT: The teacher was the mean one. All right. That is all.

IN THE COMMON PLEAS COURT OF
PHILADELPHIA

FAMILY DIVISION—JUVENILE BRANCH

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(21)
IN THE MATTER OF EDWARD TERRY

No. J-162408

CONT'D FROM 2/27/69 (7-11-68, BURG., LARC., R.S.G.; & CONSP.)

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(22)
IN THE MATTER OF EDWARD TERRY

No. J-162408

CONT'D FROM 2/27/69 (8-31-68, A & B ON OFF.; & CONSP.)

Philadelphia, Pa., March 27, 1969

ROOM "E", 1801 Vine Street

BEFORE:

HON. JOSEPH C. BRUNO, J.

PRESENT:

LOUIS POKRAS, ESQ.
A.D.A. for the Commonwealth
IRENE H. COTTON, ESQ. (C.L.S.)
for the Defendant

* * * * *

THE COURT: Do you want to say something?

MISS COTTON: I would like to explain to your Honor that we have two matters before you. One is for disposition only. That was for the burglary of the delicatessen which was heard by you. The other is the case in which we have refused to waive our right to a jury trial and all that you told me over the phone, what you intended to do, I don't think it is on the record, what the court wants to do about that.

THE COURT: At that time you made a request for a jury trial or, at least, you told me you made a request and one of the reasons I did not rule on it, at that time, was that the case was being—

MISS COTTON: Continued.

THE COURT: —continued for other reasons. The case is going to be tried today. I am denying your request for a jury trial.

MISS COTTON: Thank you, sir.

THE COURT: All right.

MR. POKRAS: We are ready to proceed on No. 22, your Honor, and that is an adjudicatory hearing. No. 21 is for disposition.

THE COURT: Yes, but unfortunately, on my list they have them both down for the same thing. So, just to make sure, which incident are you talking about?

My list does not—

MISS COTTON: Just assault and battery on a police officer.

THE COURT: What is the date of arrest?

MISS COTTON: August 31st.

THE COURT: August 31st on No. 22.

All right, Mr. Pokras.

COMMONWEALTH'S EVIDENCE

POLICE OFFICER SWEENEY (#456—Fairmount Park Police, Philadelphia, Pa.), sworn.

DIRECT EXAMINATION

BY MR. POKRAS:

Q. What is your name and number, officer?

A. Policeman Sweeney, No. 456, Fairmount Park Police.

Q. I call your attention to August 31st, 1968. Did you arrest Edward Terry on that day?

A. No, sir.

Q. Did you have an incident with him on that day?

A. Yes, sir.

Q. Would you tell the court the circumstances?

A. If your Honor please, on August 31st, 1968, at approximately 7:00 P.M., while assigned to the A.I.D. Division, West Park Police Division, patroling west on Parkside Avenue towards 53rd, I observed two young boys fighting on the sidewalk at approximately forty feet east of 53rd Street with approximately six boys, including the defendant, Terry, among them.

I stopped my prowl car and I called them to break the fight up, at which time the two young boys did.

I proceeded, again, west on Parkside Avenue and north on 53rd Street. At that time, I observed the six older boys encouraging two younger boys to fight again. I made a U-turn and I came back on the group. I got out of my prowl car and I went over to the two younger boys and I broke the fight up, and I told the boys, the older boys, that if they had nothing better to do to get out. I left and at that time, Terry who had a one by three, approximately three feet long, stick struck me on the left side.

BY THE COURT:

Q. Would you give me a description of that again?

A. A one by three wood stick, approximately three feet long, struck me on the left side with this stick and then ran east on Parkside, towards Edgewood and over Edgewood to Lindenwood.

I gave pursuit on Lindenwood Street and he stopped. I told him to drop the stick and he was under arrest.

He dropped the stick and then he swung at me with his right hand. I grabbed his hand and his arm. I got hold of him around the back of his neck or collar of his jacket and I told him to stop fighting, that he was under arrest.

He called for the other boys who were walking away from us to come back and help him which Roman Jones,

who had later been identified as Roman Jones, and four other boys came back and started to swing at me, and tried to get Terry away from me.

I called to one person standing in the store, for help, to call the police. The person made no move, so I pushed my way back into the prowl car and called for assistance, and gave chase at which time he was running south on 53rd Street, to Jefferson. I arrested, on August the 31st, Roman Jones.

Through information received from Roman Jones concerning Terry, who had the stick that he hit me with, and where I had given chase at the approximate address of 53rd Street, between Parkside and Jefferson, my partner and I, on 9/1/68, in an unmarked car, observed the defendant walking north on 53rd Street, at Parkside. He again spotted us and we gave chase, east on Parkside and south on Edgewood, and he went into an alleyway. We got out of the prowl car and gave chase, foot chase, at which time we caught him in front of his house and I arrested him. From there, with his mother, he was taken into the 19th District and slated.

Q. Officer, at the time of the incident of the fight, when he came after you, you say you grabbed his arm?

A. I grabbed his arm and the back of his collar.

Q. Did he ever complete his — —?

A. Yes, sir, later. When the other boys jumped me, I had no choice but to let him free.

Q. Were you struck?

A. Yes, sir.

Q. Was this by fist or otherwise?

A. By fist, like.

Q. What part of your body was struck?

A. Mostly on the left side. That's where I had him.

Q. Did you require any medical treatment?

A. No medical treatment.

MR. POKRAS: Cross examine.

CROSS EXAMINATION

BY MISS COTTON:

Q. Officer Sweeney, when you told the boy to put the stick down, you testified that he did so?

A. The boy?

Q. The boy who had the stick, did he put it down?

A. (No response.)

Q. After he put the stick down, what did you do?

A. I told him to put the stick down and he was under arrest.

Q. This was after he put the stick down, what did you do?

A. I started to walk towards him and when I stepped forward he swung at me. That's when I grabbed him.

Q. You said that he swung at you? Did he connect?

A. No. I caught one with my hand. That was the only thing that helped at the time.

Q. How did you grab him?

A. By the arm and probably around the back of the neck. I tried to get the jacket. It was a shirt, I believe. He had a shirt on. I tried to get the shirt and pull him off balance.

Q. And did you manage to get him into the car?

A. No.

Q. What happened?

A. He called the other boys to help him at which time four other boys came swinging at me and dragging Terry away from me.

Q. And how did you react to that?

A. I called for help to assist me. As I said, there was an adult standing in the store doorway, which was approximately fifty feet south of Lindenwood Park Terrace and I called—he was standing in the doorway. I called him to call the police that I needed help. So, he made no move. I pushed and shoved to my prowl car and then they all took off at that time.

Q. Did you have your service revolver, blackjack, nightstick and things of that nature?

A. I had a service revolver and my blackjack—I mean my jack was in the car.

Q. Did you make any attempt to use these weapons?

A. When they took off, I had the mike in my hand. That was the only thing I could get free to call—

Q. Now, the following day, you went to arrest the boy and you finally caught up with him at his house?

A. Right. He tried to go into his house but the door was locked.

Q. When you tried to apprehend the boy, did he go quietly?

A. No, ma'am.

Q. What happened?

A. He started to fight as soon as I grabbed him. I mean I physically grabbed him in the back and at that moment he struggled and turned, and he definitely knew what was being done to him. He started to fight and was threatening and was calling for his mother, and the detective and myself, we took him in.

Q. How did you manage to take him in?

A. (No response.)

Q. He is a big fellow, what did you have to do to get him in?

A. Nothing, once we managed—well, one of us was holding his hands and once we mentioned his mother was coming with us, he just came and, like, he waited until his mother came.

Q. Before his mother came, what did you have to do?

A. Hold him from hitting me. Other than that, nothing.

Q. Nothing other than that?

A. (No response.)

MISS COTTON: No further questions.

MR. POKRAS: The commonwealth rests.

MISS COTTON: At this point, we will demur to the charge of disorderly conduct, in which there has been no evidence.

By the officer's own testimony, this was a scrape in which there were six fellows, including Terry, who were urging younger boys to fight but that does not constitute disorderly conduct.

THE COURT: How about the reference to the testimony, Miss Cotton, about when the officer went back again and he found these boys urging the others to fight?

MISS COTTON: That's what I am talking about, sir.

THE COURT: And when this fellow swung a stick at the officer, when he took part in an affray, after the officer placed him under arrest and he called for help from the others and he took a couple more swings at the officer—I deny the demurrer.

MISS COTTON: All right, sir.

We call Mr. Goobey.

DEFENDANT'S TESTIMONY

ROBERT GOOBEY (1737 North Lindenwood Street, Philadelphia, Pa.), sworn.

DIRECT EXAMINATION

BY MISS COTTON:

Q. Would you spell your last name?

A. G-o-o-b-y.

BY THE COURT:

Q. Mr. Gooby, would you try to keep your voice up?

THE CRIER: Speak up!

BY THE COURT:

Q. So that I can hear everything.

A. Right.

Q. I want to hear what you have to say.

A. (No response.)

BY MISS COTTON:

Q. Mr. Gooby, I will stand here and I will talk to you and you will address your answers to the judge so that he can hear you.

A. (No response.)

Q. Were you present at the time the officer came upon Terry and the other boys with this stick; is that correct?

A. I was present at the time when the officer came around the corner. I was going across the street towards my house.

Q. And what did you see while you were there in the street?

A. Well, in a short space of time, I saw these two boys as I was coming out of the store standing in the street with a board in their hand and just about this time the officer's car came around the corner. So, he said, "What are you fellows doing. Come here."

And they stood there, and he said, "Get into the car."

So the boys said, "What for?"

And he said, "I said, get into the car."

In the meantime, he appeared to be putting on his gloves.

Q. Pardon me. He called them "fellows"?

A. Well, he said, "You boys come here," and they moved somewhat hesitantly. So, it appeared as though he was going to force them in and this is when he reached out and grabbed this particular fellow in the collar as to put him into the car and this is when, you know, the fisticuffs started.

Q. Mr. Goobey, did you testify that the officer put on a pair—

MR. POKRAS: I will object. She is leading: "Did you testify that—"

MISS COTTON: Well, I will have the stenographer read it back.

(The previous question and answer was read back as follows:)

"Q. And what did you see while you were there in the street?

"A. Well, in a short space of time, I saw these two boys as I was coming out of of the store standing in the street with a board in their hand and just about this time the officer's car came around the corner. So, he said, 'What are you fellows doing. Come here.'

"And they stood there, and he said, 'Get into the car.'

"So the boys said, 'What for?'

"And he said, 'I said, get into the car.'

"In the meantime, he appeared to be putting on his gloves."

BY MISS COTTON:

Q. When the boys did not move fast enough towards the officer's car, what did Officer Sweeney do then?

A. Well, when he made the statement, one of the boys—one of the smaller ones, he walked away. The other one remained standing and this is when the officer reached out and grabbed him by the neck, and this particular action caused this fellow to naturally try to free himself, and this is when it started, you know, the blows and wrestling around.

Q. Did it appear to you, from what you could see—

THE COURT: I don't want to know how it appeared to him. I want to know what he saw.

BY MISS COTTON:

Q. Did you see the officer—

THE COURT: Watch the question, now. You'd better not be leading.

MISS COTTON: He has already testified, sir, that he saw the officer put his arm around the boy's neck.

THE COURT: All right.

MISS COTTON: Now, I want to know what that arm around his neck did, if anything.

A. Well, No. 1, he reached out and grabbed the fellow, first of all, with his—he reached around and grabbed him by the neck. I don't recall which hand but, anyway, the fellow pushed away and this made him reach around his head, I think, in this manner (indicating), and he grabbed him behind the head as if he was pulling towards him or—towards him and they started to wrestle around again, and by that time, it was in the middle of the street. Then the officer reached around and he first grabbed his pistol, and then he looked directly at me and then he went around me and he got his blackjack. Then they again started wrestling around and all this took place in just a few seconds, really.

Q. Mr. Gooby, did you know this boy on the day of this incident?

A. Not really. I only know that I have seen him in the neighborhood.

Q. Did you know any of his family before?

A. Not intimately. I have seen them both in the neighborhood. I mean we had no close affiliations.

Q. Is that how you became acquainted?

MR. POKRAS: Objection to the term, your Honor.

THE COURT: Objection overruled.

BY MISS COTTON:

Q. What did you do about the incident that you saw?

A. Well, for one thing, my being present there I was asked, I think, the next day, if I'm not mistaken, it was on a Sunday, if I would go down—

MR. POKRAS: I object.

THE COURT: Objection sustained.

A. (continuing)—go to the—

THE COURT: The objection was sustained.

BY MISS COTTON:

Q. Don't answer that question, Mr. Gooby.

Did you go to the police station to report this incident?

MR. POKRAS: I will object.

THE COURT: Miss Cotton!

MISS COTTON: If your Honor please—

THE COURT: I want to give you as much leeway as I can reasonably give you. You will notice I didn't say legally, because I have given you more than that but I have to stay within reason.

MISS COTTON: I think that objection was on account of hearsay from Mrs. Terry, but now I am not asking—

THE COURT: You are asking a leading question.

MISS COTTON: Very well, your Honor.

BY MISS COTTON:

Q. Did you discuss this incident with anyone?

MR. POKRAS: I will object.

THE COURT: Objection sustained.

MISS COTTON: Well, now that your Honor knows what I am trying to reach, then every question I will ask will appear to be leading.

THE COURT: Well, now, you know the rules of evidence as well as I do, Miss Cotton. I can't throw out the rules of evidence just because you can't find a way around them.

May I see both of you at side bar?

MISS COTTON: Yes, sir.

(Side bar conference.)

MISS COTTON: If your Honor please, we will hear from Mrs. Terry.

THE COURT: All right.

MRS. TERRY (Mother of Juvenile), sworn.

DIRECT EXAMINATION

BY MISS COTTON:

Q. Mrs. Terry, on the day that Eddie got arrested—it was Sunday, you were at home; is that correct?

A. Yes, sir.

Q. And I want you to speak loud so the judge can hear you.

Would you tell him what you heard and saw on that day?

A. Well, it was Sunday. I was in the house and I heard a commotion out front and I thought, perhaps, it might have been the kids because it was, like, coming from my picture window. I have a large window, and I got up and I ran to the door there. And when I got to the door, I saw Officer Sweeney with my son, with this hand—

MISS COTTON: Indicating the left hand.

A. (continuing) And at this time they were fighting. He had already passed one, just as I was going to the door. He hit him again and this is when I ran between them and I asked him what he was doing, what was this all about.

I said to him, "Why can't we go into the house and perhaps you can explain this to me?"

And he told me, he said, "No, I'm not going anywhere."

Terry was crying. He said, "Let my mother go with me."

I asked him would he wait until I could go too—

BY THE COURT:

Q. Did he wait?

A. Yes, sir.

MISS COTTON: Cross examine.

MR. POKRAS: No questions.

MISS COTTON: Thank you, Mrs. Terry, you may sit down.

(Witness excused.)

MISS COTTON: This is the case for the defense, Your Honor.

Now, if your Honor please, I think what the evidence has indicated, that Officer Sweeney came across a group of scuffling youngsters and he told them to break it up and they did.

He came across a boy with a piece of wood and he told him to put it down. The boy with the stick, Edward Terry, did put it down there.

THE COURT: Just a minute, Miss Cotton. Let's get the summary of what happened correctly. The officer came upon two young boys fighting, being egged on by a group of older boys.

MISS COTTON: It was first, only being watched by a group of older boys.

THE COURT: He said, "Break up that fight."

MISS COTTON: Yes, sir, peaceably.

THE COURT: He saw the boys were urging the younger boys to fight again. He made a U-turn and he went back. The defendant had a stick which, before, he had put it down and he struck the officer with the stick. That is the testimony.

Then the officer said, "Put down the stick, you are under arrest."

He put the stick down. The officer walked toward him. He swung at the officer.

Now, that is the testimony up to this point.

MISS COTTON: All right. Before this boy swung at the officer?

THE COURT: Yes.

MISS COTTON: After the officer told him he was under arrest?

THE COURT: Yes.

MISS COTTON: The officer put on a pair of black gloves. Now, I don't know why he did that but it would indicate that this officer was spoiling for a fight, that he knew he was going to strike this child and—

THE COURT: Miss Cotton, if you want to recite what the testimony was, that—

MISS COTTON: No, sir. I am not doing that.

THE COURT: But I am not going to let you use that type of language in this courtroom in the light of the testimony that has been presented here today. There is no indication that this officer or any one else was spoiling for a fight other than this defendant.

MISS COTTON: Your Honor, it was not the defendant who put on a pair of gloves before touching another person, and I am sorry if the word "spoiling," offended the court. I didn't mean to use that type of language here.

THE COURT: The testimony is that one witness saw the officer putting on a pair of gloves, or apparently putting on the part of a glove period. That is the only testimony you have as to any mention of gloves. This same witness did not see what had occurred before.

Now, if you are looking for an explanation as to why the officer put that glove on, I can think of one—as protection against the stick that was being swung at him.

All right, go ahead.

MISS COTTON: If Your Honor please, the testimony was, the stick was swung at him at 53rd and Parkside. The gun incident took place at 51st and Lindenwood, which was sometime later the same day. At that point the boy had the stick and he put it down when he was told to.

THE COURT: All right, go ahead, Miss Cotton. I know what the testimony was.

Go ahead.

MISS COTTON: The next day when Officer Sweeney came to the residence of the defendant, he testified he had to chase the boy and when he caught him he had to hold onto him.

THE COURT: He said with the help of a fellow officer.

MISS COTTON: Who arrived later.

THE COURT: Who arrived later and that they were holding him, together.

Okay, go ahead.

MISS COTTON: Mrs. Terry testified she heard a commotion on the porch and what she saw was Officer Sweeney holding her boy with his left hand and striking her boy with his right.

Now, there is a variance of testimony and it is up to you to resolve that.

THE COURT: All right.

MR. POKRAS: The only thing that I can add was that the mother didn't see what happened when the officer and the boy first came together.

THE COURT: Look, I understand the mother's testimony and I believe every word the mother said.

MR. POKRAS: That's right.

That's all I have.

THE COURT: There is no question in my mind as to the mother's testimony.

I adjudge Edward Terry delinquent.

May I ask you first, Miss Cotton, maybe you can save me sometime of going through this record—

MISS COTTON: Yes, sir, I can.

THE COURT: Has the defendant been committed anywhere?

MISS COTTON: Yes, sir.

In January, he was charged with an assault on a teacher and his case came up last week before Judge O'Neill. He was adjudged delinquent and he was committed to Cornwell Heights.

THE COURT: Where?

MISS COTTON: Cornwell Heights.

THE COURT: All right. I will make the same disposition.

MISS COTTON: Very good, sir.

THE COURT: Cornwell Heights in both 21 and 22.

That was 21's testimony that I had deferred disposition on?

MISS COTTON: Right.

BY THE COURT: (to Deft.)

Q. Young man, let me just say this to you: We have too much violence on our streets, and I want you to do something as you grow up. I want you to start learning how to respect an officer when he tries to break up a fight. You are going to turn this city into a real holocaust. You are going to have to live in it, son. Make it a better place in which to live.

You are a healthy, good looking boy and there is no reason in the world why this should not be a good place to live in so that you can enjoy it and raise a family of your own. But this kind of activity on your part is inexcusable. All you are doing is to help drive this city further down.

A. (No response.)

THE COURT: Now, Cornwell Heights, you have already been committed there. I am going to make the same commitment.

I think that maybe you can get some guidance there that may help you change some of your thinking.

All right.

MISS COTTON: Thank you, sir.

[109]

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

No. 289 January Term, 1970

IN THE MATTER OF EDWARD TERRY,
A Minor

Appeal of Edward Terry, A Minor

No. 290 January Term, 1970

IN THE MATTER OF JOSEPH McKEIVER,
A Minor

Consolidated Appeals from the Orders of the Superior Court of Pennsylvania at October Term, 1969, Nos. 717 and 666, Affirming the Orders of the Court of Common Pleas, Family Division, Juvenile Branch, of Philadelphia County, C.C. No. 140439, J. No. 162408 and C.C. No. 102024, J. No. 131550.

Appeal of Joseph McKeiver, A Minor

OPINION OF THE COURT

ROBERTS, J.

Filed: May 4, 1970

Joseph McKeiver[1] and Edward Terry[2] are juvenile delinquents, having acquired that status upon findings by

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[1] In May of 1968 appellant Joseph McKeiver, then sixteen years old, was charged with robbery, larceny and receiving stolen goods in a juvenile delinquency petition. The essence of the charge was that he and

the Juvenile Court of Philadelphia that each had violated a law of the Commonwealth.[3] The Superior Court affirmed

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some twenty or thirty other youths had taken some twenty-five cents from three young teenagers. At the time the charges were brought against him, appellent had never before been arrested and had a record of gainful employment.

When McKeiver's case was called for trial on October 17, 1968, his counsel advised the court that he had not had an opportunity to discuss the case with his client and was therefore unable to proceed. The court gave counsel five minutes to talk with his client and then proceeded to hear the case. Counsel requested and was denied the right to a jury trial.

The Commonwealth's evidence consisted of the testimony of two of the three alleged victims, who gave the following narrative of events. While they and a companion were playing in Fairmount Park, they suddenly realized that they were being pursued by some twenty or thirty boys on foot and by three boys on bicycles. Two of the boys who were on bicycles remained at a distance while the third approached the three victims. What the small army of robbers on foot did at this point is unclear, but the remaining boy on a bicycle demanded money. One of the three victims refused, was punched and gave the thief a quarter. The bandit then rode off and the three victims were taken to a park guard station by a passing motorist where, after a few minutes of preliminary questioning, the two witnesses were placed in a patrol car and taken for a ride around the area. Within minutes the two victims spotted someone whom they thought was the boy who robbed them—that person turned out to be Joseph McKeiver.

The testimony given by the two alleged victims at the hearing was weak. One described the robbery as a gang effort while the other testified that the thief acted alone. Both stated that the robber did not have on glasses, but McKeiver has worn them since childhood. One testified that the robber gave his bicycle to another *and* that the robber rode a bicycle away from the robbery, and was riding one when arrested. Both said that the robber rode a bicycle throughout the event, and yet one stated that he identified the robber by his distinctive walk.

After the evidence was given, counsel for McKeiver made an argument to the trial judge similar to that usually made to a jury: the story of the alleged victims was incredible, the eyewitness identification of children is unreliable, and the facts had not been proved beyond a reasonable doubt. The judge was apparently unimpressed by these efforts; he found McKeiver to be a "delinquent child" and placed him on probation. McKeiver applied for a rehearing alleging that the court had erred in refusing him the right to a trial by jury. The petition was denied and the Superior Court affirmed *per curiam*, without opinion.

[3] Edward Terry was adjudged a juvenile delinquent on March 27, 1969, in proceedings initiated by petition. The evidence tended to show that one Officer Sweeney, of the Park Guard, happened upon a fight in the park and that when he ordered the combatants to break up, two of the observers to the fight hit him with fists and with a stick. Sweeney was apparently not injured. Later that same day Sweeney saw the two boys

the adjudications per curiam and we granted allocatur. Their consolidated appeal raises a single question: whether there is a constitional right to a jury trial in juvenile court.

Appellants argue that the Constitution of the United States, especially as interpreted by *In re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967) and *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), gives them the right to insist on a jury trial. We cannot agree.

For over sixty-five years the Supreme Court gave no consideration at all to the constitutional problems involved in the juvenile court area.[4] Then came the landmark decision in *In re Gault*.[5] The decision is somewhat of a paradox, being both broad and narrow at the same time. It is broad in that it evidences a fundamental and far-reaching disillusionment with the anticipated benefits of the juvenile court system:

"[T]he highest motives and most enlightened impulses led to a peculiar system for juveniles, unknown to our law in

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who had attacked him. Sweeney ordered them to halt, which they did. Apparently Sweeney then grabbed Terry about the neck, but he escaped and ran away. The next day Sweeney again saw Terry on the street and, after a chase, caught and arrested him. Terry testified that Sweeney beat him at the time of the arrest.

Terry's case was first called on January 20, 1969. At that time counsel for Terry indicated that he wished to have a jury trial and the matter was continued. The hearng was finally held on March 27, 1969, at which time counsel for Terry reiterated his request for a jury trial, which was denied. Terry was found to be a delinquent and was committed to the Youth Development Center at Cornwells Heights.

[3] "(4) The words 'delinquent child' include:

"(a) A child who has violated any law of the Commonwealth or ordinance of any city, borough or township; . . ."

Act of June 2, 1933, P.L. 1433, 11 P.S. § 243.

[4] "The original juvenile court act of Illinois, a model quickly followed in almost every state, was approved by the governor of Illinois on April 21, 1899. Until March 21, 1966, the Supreme Court had never passed upon the legality of the juvenile court procedures or of police practices respecting juveniles." Paulsen, *Kent* v. *United States: The Constitutional Context of Juvenile Cases*, 1966 Supreme Court Review 167 (1966).

[5] *Gault* was presaged by *Kent* v. *United States*, 383 U.S. 541, 86 S.Ct. 1045 (1966), although the narrow issue involved in *Kent* concerned the nature of the requirements for a valid waiver of the Juvenile Court of the District of Columbia's "exclusive jurisdiciton."

any comparable context. The constitutional and theoretical basis for this peculiar system is—to say the least—debatable. And in practice, as we remarked in the *Kent* case, supra, the results have not been entirely satisfactory. Juvenile Court history has again demonstrated that unbridled discretion, however benevolently motivated, is frequently a poor substitute for principle and procedure. . . . The absense of substantive standards has not necessarily meant that children receive careful, compassionate, individualized treatment. The absence of procedural rules based upon constitutional principle has not always produced fair, efficient, and effective procedures. Departures from established principles of due process have frequently resulted not in enlightened procedure, but in arbitrariness." [6]

Continuing to paint with a broad brush, the Court announced its intention to require that the juvenile courts function with "the procedural regularity and the exercise of care implied in the phrase 'due process.'" [7] At this point, however, the Court narrowed the focus of its decision and quoted from its earlier holding in *Kent*, saying:

> " 'We do not mean * * * to indicate that the hearing to be held must conform with all the requirements of a criminal trial or even of the usual administrative hearing; but we do hold that the hearing must measure up to the essentials of due process and fair treatment.' We reiterate this view, here in conjunction with a juvenile court adjudication of 'delinquency,' as a requirement which is part of the Due Process Clause of the Fourteenth Amendment of our Constitution." [8]

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[6] *In re Gault*, 387 U.S. 1, 17–19, 87 S.Ct. 1428, 1438–39 (1967).

[7] 387 U.S. at 27–28, 87 S.Ct. at 1444.

"Due process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise. . . . [T]he procedural rules which have been fashioned from the generality of due process are our best instruments for the distillation and evaluation of essential facts from the conflicting welter of data that life and our adversary methods present. It is these instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data." 387 U.S. at 20–21, 87 S.Ct. at 1439–40.

[8] 387 U.S. at 30–31, 87 S.Ct. at 1445, citations omitted.

The Court then specifically enumerated four due process rights which it held applicable in juvenile proceedings: (1) the right to adequate and timely notice of the charges; (2) the right to counsel; (3) the right to confrontation and cross-examination; and (4) the privileges against self-incrimination. Additionally, a majority of the Court specifically declined to rule on two other rights; the right to a transcript and the right to appellate review.

As can be seen from the quoted language, we are confronted with a sweeping rationale and a carefully tailored holding. If we had only the broader language it would be difficult to resist the conclusion that the Supreme Court had concluded that juvenile courts must comply with *all* the requirements of due process. The holdings do not, however, seem to contemplate so large a result, and our task is to decide whether the right to a jury trial ought to be operative in the juvenile court under the reasoning of *Kent* and *Gault* or under our own reading of the Constitution.

Appellants argue that the Supreme Court's 1968 decision in *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), is useful in the quest for a determination of what ought to be included in the bundle of due process rights properly applicable in juvenile courts. The Supreme Court there held that the "Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." [9] Again, the Court spoke in sweeping language, calling the right to trial by jury fundamental to our system of justice, and installed the right to a jury trial as one of those protections in the Bill of Rights which is fully applicable as a restraint on state conduct.

But *Duncan* also contained language which indicates that the ruling is not necessarily controlling here. In a discussion of the proper standards for "incorporation," the Court indicated that a new standard had been operating in recent cases. No longer was the inquiry to focus on whether *some* civilized system of justice could be constructed without utilization of a particular safeguard. Realizing that every state in the union operated under highly similar versions of the Anglo-American common law system, the Court declared

[9] 391 U.S. at 149, 88 S.Ct. at 1447.

that incorporation was appropriate whenever a particular procedure was fundamental to this kind of a legal system—"whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty."[10] The Court then enumerated those protections in the Bill of Rights which had recently been made applicable to the states, add concluded that of each "it might be said that the limitation in question is not necessarily fundamental to fairness in every criminal system that might be imagined but is fundamental in the context of the criminal processes maintained by the American states."[11] Referring specifically to the right to trial by jury, the Court stated that a "criminal process which was fair and equitable but used no juries is easy to imagine. It would make use of alternative guarantees and protections which serve the purpose that the jury serves in the English and American system."[12]

In addition to the above stated restriction on the absolutism of *Duncan*, we must also consider the narrower portions of *Gault's* holdings, remembering that the Supreme Court specifically refused to apply the totality of the due process procedural safeguards to juvenile courts. Keeping these restrictions in mind, we can now determine whether the right to a trial by jury is "fundamental" in the context of our juvenile courts, within the meaning of *Duncan*.

In seeking to answer this question, we must recognize that the due process procedural safeguards which *Gault* specifically made applicable to juvenile courts have already caused a significant "constitutional domestication" of juvenile court proceedings. The right to adequate and timely notice, the right to counsel, the right of confrontation and cross-examination, and the privilege against self-incrimination serve to eliminate much of the danger of arbitrariness. Further, we are confident that juveniles also enjoy the right to have a transcript of the hearing, the right of appellate review,[13] and the right to be declared delinquent only upon evidence which demonstrates that the facts upon which the

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[10] 391 U.S. at 150, 88 S.Ct. at 1448 (footnote 14).

[11] Id.

[12] Id.

[13] Act of June 2, 1933, P.L. 1433, 11 P.S. § 257.

declaration is made are true beyond a reasonable doubt.[13a] Together these rights insure that the juvenile court will operate in an atmosphere which is orderly enough to impress the juvenile with the gravity of the situation and the impartiality of the tribunal [14] and at the same time informal enough to permit the benefits of the juvenile system to operate.

The proper inquiry, then, is whether the right to a trial by jury is "fundamental" within the meaning of *Duncan*, in the context of a juvenile court which operates with *all* of the above constitutional safeguards. Since the Supreme Court felt that the right was "fundamental" in the context of the normal criminal process, which also operates with all of these safeguards, it is our view that the answer to our inquiry turns upon whether there are elements in the juvenile process which render the right to a trial by jury less essential to the protection of an accused's rights in the juvenile system than in the normal criminal process, and

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[13a] ". . . The constitutional safeguard of proof beyond a reasonable doubt is as much required during the adjudicatory stage of a delinquency proceeding as are those constitutional safeguards applied in *Gault*—notice of charges, right to counsel, the rights of confrontation and examination, and the privileges against self-incrimination." *In re Winship*, No. 778, October Term, 1969 (Supreme Court of the United States, filed March 31, 1970).

[14] "[R]ecent studies . . . suggest that the appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be a more impressive and more therapeutic attitude as far as the juvenile is concerned." 387 U.S. at 26, 87 S.Ct. at 1443.

"[T]here is another observation worth making. Informal methods relying on kindness, expertise, and discretion are most acceptable in contexts of trust. If nearly everyone in a community shares a common faith in institutions, and in the generally prevailing goals, safeguards designed to protect against abuse will not seem so important. . . . [But] this is not the situation in the crisis-ridden cities of today. . . . Divisions in the urban community are deep. Formal procedure, to some extent may be able to dispel mistrust. A judge who is supplied with specific rules regarding the fundamentals of fairness and who follows them may lessen the tensions that both he and the respondents feel. The adversary system that many see as a machine to sow discord does give the dispossessed a voice, and a time and place to be heard, and may offer a sense of participation in the decision making that may affect respondents mightily. Ironically, the adversary system may provide some badly needed glue for the preservation of unity." Paulsen, *The Constitutional Domestication of the Juvenile Court*, 1967 Supreme Court Review 233, 242–43 (1967).

therefore not so "fundamental" as to be constitutionally required.

We believe that such factors do inhere in the juvenile system. First, we believe that the judges in the juvenile courts do take a different view of their role than that taken by their counterparts in the criminal courts.[15] We fully realize that this faith in the quality of the juvenile bench is not an entirely satisfactory substitute for due process, and we certainly do not rely heavily on this essentially subjective factor; but on the other hand we do not choose to ignore such considerations, and will not deprive them of all weight.

Second, the juvenile system has available and utilizes much more fully various diagnostic and rehabilitative services. And although the experts are not nearly so numerous as one might hope, they still provide the juvenile courts with services specially designed to aid minors, which are far superior than those available in the regular criminal process. It is the opportunities for progress offered by this area which constitute the single best reason for preserving the juvenile system. Properly operated, the juvenile system is capable of giving understanding and sympathetic treatment for each juvenile by providing the correctional, rehabilitative and instructional attention appropriate to each case. Having recognized the value of this approach, it is indeed regrettable that it is as inadequately utilized as it is. In this area more than in any other, it is the false economies of today which will contribute exponentially to the waste of tomorrow. Yet a little bit of wisdom is better than none, and in the end we see this aspect of the juvenile system; underused though it may be, as constituting one of its very real strengths.

Third, we must recognize that the end result of a declaration of delinquency *is* significantly different from and less onerous than a finding of criminal guilt. There is no public record of the adjudication,[16] and its results are not admis-

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[15] See generally *Commonwealth* v. *Johnson*, 211 Pa. Superior Ct. 62, 234 A.2d 9 (1967).

[16] "The records of the proceedings of the juvenile courts shall be kept in a docket separate from all other proceedings of such courts, and shall be withheld from indiscriminate public inspection, but shall be open to inspection by the parent or other representative of the person, institutions, association or society concerned, and other persons having a legitimate interest." Act of June 2, 1933, P.L. 1433, 11 P.S. § 245.

sable in subsequent legal proceedings. None of the disabilities which follow a criminal conviction attach to an adjudicated delinquent,[17] and most importantly, the institutions to which juveniles are committed are something less than jails, for there is a greater emphasis on rehabilitation. We do not mean to say that the post-adjudication process has lived up to expectations. It has in many respects fallen far short of its goals, and its reality is far harsher than its theory. But we are not yet convinced that the current practices do not contain the seeds from which a truly appropriate system can be brought forth.

Finally, we note that of all the possible due process rights which could be applied in the juvenile courts, the right to trial by jury is the one which would most likely be disruptive of the unique nature of the juvenile process. Utilization of the other due process rights in the juvenile courts will not require the judge to abandon traditional practices; the hearing can still be conducted with some flexibility and with patience and understanding. A jury trial, on the other hand, by replacing the judge as the finder of fact, would probably require substantial alteration of the traditional practices. Faced with the necessity of refereeing a contest between the state and one of its juvenile citizens, and deprived of the power of the final arbiter, the juvenile court judge would of necessity have to concern himself much more with the technicalities of proper procedure, and would have a vastly reduced capacity to guide and mold the hearings. It is our view that the procedural rights which we have held applicable in the juvenile process will give the juveniles sufficient protection, and there is no need to add an element, the right to a trial by jury, which might well destroy the traditional character of juvenile proceedings.

As must be obvious by this time, we are confident that a properly structured and fairly administered juvenile court system can serve our present societal needs without infringing on individual freedoms.[18] It is this confidence which, as

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[17] Act of June 2, 1933, P.L. 1433, 11 P.S. § 261.

[18] This Court, under the power granted it by Article V, Section 10(c) of the Pennsylvania Constitution, has the authority to formulate rules governing the practice, procedure and conduct of the juvenile courts in this Commonwealth. This authority can and will be utilized whenever circumstances indicate that action is necessary to maintain the con-

much as anything else, has led us to the conclusion we reach today. Until such a time as we are disabused of our belief that the potential for growth inherent in the juvenile system will not be ignored, we hold that the juvenile courts in this Commonwealth, if conducted in accordance with the procedural safeguards set forth in this opinion, are not constitutionally compelled to grant their constituency the right to a trial by jury.

Orders affirmed.

Mr. Justice Cohen filed a Dissenting Opinion.

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stitutionality and fairness of juvenile proceedings, and we note that a committee is currently formulating, for submission to this Court, a set of comprehensive rules covering juvenile proceedings.

[109]

IN THE SUPREME COURT OF PENNSYLVANIA

Eastern District

No. 289 January Term, 1970

IN THE MATTER OF EDWARD TERRY,

a Minor

Appeal of Edward Terry, a Minor

No. 290 January Term, 1970

IN THE MATTER OF JOSEPH McKEIVER,

a Minor

Consolidated Appeals from Orders of Superior Court, Nos. 717 and 666, October Term, 1969, Affirming Orders of Court of Common Pleas, Family Division, Juvenile Branch, of Philadelphia County, C.C. No. 140439, J. No. 162408 and C. C. No. 102024, J. No. 131550

Appeal of Joseph McKeiver, a Minor

DISSENTING OPINION

COHEN, J.

Filed: May 4, 1970

The Sixth Amendment to the United States Constitution states "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." In *Duncan* v. *Louisiana*, 391 U.S. 145, 154

(1968), the United States Supreme Court held that "the right to jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend due process of law to all persons within their jurisdiction." The majority recognizes these principles but finds that four factors inhere in the juvenile system which "render the right to a trial by jury less essential to the protection of an accused's rights . . . than in the normal criminal process, and therefore not so 'fundamental' as to be constitutionally required." These elements are (1) the different view of their role taken by judges in the juvenile courts as opposed to their counterparts in the criminal courts, (2) the availability to and the utilization by the juvenile system of various diagnostic and rehabilitative services, (3) the different end result of a declaration of deliquency compared with a finding of criminal guilt, and (4) the disruption of the unique nature of the juvenile process that would result from the introduction of jury trials.

The majority apparently believes that the existence of these factors means that the due process of law is not denied juveniles when they are denied a jury trial and thus that the juvenile court system is an exception to the general rule enunciated in *Duncan*. First, I cannot agree with the majority that footnote 14 in *Duncan* or anything else in the opinion represents a restriction on the absolutism of its holding. In that footnote, 391 U.S. at 149-50, the Court stated that incorporation was proper whenever "given this kind of system a particular procedure is fundamental—whether, that is, a procedure is necessary to an Anglo-American regime of ordered liberty." The Court then stated that it could easily imagine a fair and equitable criminal system that used no juries and remarked that such a system "would make use of alternative guarantees and protections which would serve the purposes that the jury serves in the English and American systems." That statement in no sense narrows the holding in *Duncan*; if anything, it amplifies it by emphasizing the role the jury plays in the Anglo-American system of jurisprudence. *Duncan* clearly stands for the proposition that the due process of law requires that the states provide jury trials in all serious criminal cases.

Having determined that nothing in the *Duncan* opinion itself detracts from the absolutism of its holding, it is

necessary to examine the four elements the majority believes distinguish the juvenile system from the criminal court system to see if they are legally and/or constitutionally relevant. The majority itself states that it does not rely heavily on the first factor (the view of their role taken by juvenile court judges), and the United States Supreme Court, in the recent case of *In the Matter of Samuel Winship*, U.S. (1970) (holding that the constitutional standard of proof beyond a reasonable doubt is required during the adjudicatory stage of a delinquency proceeding), stated, U.S. at, "[w]e made clear in that decision [Gault] that civil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts. . . ."

As to the availability to and utilization by the juvenile system of various diagnostic and rehabilitative services (factor 2), this seems relevant to the post-adjudicative or dispositional process rather than to the adjudicative stage. Certainly the process by which one is adjudged a delinquent has little to do with the understanding and sympathetic treatment the juvenile system is capable of giving through correctional, rehabilitative and instructional attention. What is done with an individual after it is determined he is a delinquent is a very different problem from that concerning the process by which it is decided that he is a delinquent.

The majority's third element is the different end result of a declaration of delinquency compared to a finding of criminal guilt. This includes no public record of the adjudication, the inadmissibility of the results in subsequent legal proceedings, the non-imposition of the disabilities which follow a criminal conviction, and the fact that institutions for juveniles are "something less than jails." In *Winship*, however, the United States Supreme Court stated, U.S. at ,

> "We do not find convincing the contrary arguments of the New York Court of Appeals. *Gault* rendered untenable much of the reasoning relied upon by that court to sustain the constitutionality of § 744(b). The Court of Appeals indicated that delinquency adjudication 'is not a "conviction" (§ 781); that it affects no right or privilege, including the right to hold public office or to obtain a license (§ 782); and a cloak of protective confi-

dentiality is thrown around all the proceedings (§§ 783-784).'"

In light of this, I feel that the third element is constitutionally irrelevant.

The final element is the disruption of the unique nature of the juvenile process which would allegedly occur with the introduction of trial by jury. There seems little doubt that the introduction of jury trials would necessitate the judge's concerning himself with the technicalities of proper procedure to a greater extent than required now and would reduce somewhat the flexibility and informality of the hearing. It would seem, however, that the beneficial aspects of the juvenile system result not from the adjudicatory stage but rather from the pre- and post-adjudicative stages in which, hopefully, some rehabilitation can be accomplished. It is difficult to see how the informality or flexibility of the hearing can have much effect on molding the juvenile's outlook so that his conduct will be in conformity with the rules society has established. Informality and flexibility are not ends in themselves: the purpose of the adjudicatory stage is to determine whether the defendant is a delinquent, and as some loss of informality and flexibility will not have a great effect on whatever rehabilitation the juvenile system can accomplish, I do not see an alteration of the "traditional character of juvenile proceedings" as so weighty a factor as to render the right to a jury trial less fundamental in the juvenile system than in the ordinary criminal process.

Therefore, I do not feel that the elements on which the majority relies are of such relevance and validity as to distinguish the juvenile system from the criminal court system and thus make the broad holding of *Duncan* inapplicable.

Courts today appear to be of two minds with respect to the rights of juveniles. The United States Supreme Court decisions in *Gault* and *Winship* make clear that the essentials of due process and fair treatment must be applied to the adjudicatory stage of delinquency proceedings, but in *Winship* the Court was careful to point out that its holding would not destroy the beneficial aspects of the juvenile process. Thus, due process and parens patriae have come into direct conflict. Such conflict can be seen in the decisions of this Court. For example, the majority opinion in *In the Matter of Charles Wilson,* Pa. , A. 2d

(1970) emphasizes constitutional requirements while the tone of the majority opinion in this action reflects the feeling that juveniles and the juvenile court system are somehow different and special and that the beneficial aspects of the juvenile process will be destroyed by the application of too many of the rights given adults. The trend of the United States Supreme Court decisions, however, appears to be away from parens patriae in the adjudicatory stage, and the right to trial by jury is an essential part of the adjudicatory process. I do not see valid reasons why *Duncan* should not apply to the juvenile court system.

Finally, as the United States Supreme Court has granted certiorari in *In re Burrus,* U.S. Law Week (April, 1970), in which it will face the issue presently before us, we should not have filed the opinions in this action until the *Burrus* opinion is filed. We, of course, will be bound by its decision, and, as we have waited this long for this difficult issue to be resolved, we should wait until the matter is finally settled. Once the *Burrus* opinion is filed, our opinion in this action will be of no consequence, and it is a futile effort for us to deal with this issue at this time.

I dissent.

Supreme Court of the United States

No. 2300 Misc., October Term, 1969

JOSEPH McKEIVER AND EDWARD TERRY,
Appellants,

v.

PENNSYLVANIA

APPEAL from the Supreme Court of the Commonwealth of Pennsylvania, Eastern District.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the Appellate docket as No. 1755. The case is placed on the summary calendar and set for oral argument with No. 1441.

June 29, 1970

Supreme Court of the United States

No. 2300 Misc., October Term, 1969

JOSEPH MCKEIVER AND EDWARD TERRY,
Appellants,

v.

PENNSYLVANIA

ON CONSIDERATION of the motion of the appellants for leave to proceed in forma pauperis herein,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

June 29, 1970